Supreme Court, U.S.
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No. 98-1778

IN THE

Supreme Court of the United States

MARY KOVELESKIE,

Petitioner,

v.

SBC CAPITAL MARKETS, INC.
a/k/a SBC WARBURG, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

CATHERINE M. MASTERS
Counsel of Record
NEIL LLOYD
SCHIFF HARDIN & WAITE
Attorneys for Respondent
Warburg Dillon Read LLC
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5500

Dated: June 4, 1999

153309

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED FOR REVIEW

1. The transaction costs attending litigation in federal court may not be identical to the costs attending arbitration under securities industry arbitration procedures. Is a hypothetical risk that arbitration of Title VII claims will involve non-identical costs a ground to hold an arbitration agreement invalid?

2. The Court has repeatedly held that before arbitration occurs it is premature to complain that the arbitrators may misapply the law. Is a hypothetical risk that arbitrators may misapply the law regarding Title VII a ground to hold an arbitration agreement invalid?

3. Did the 1991 Civil Rights Act overrule *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and exempt civil rights laws, including Title VII and ADEA, from the Federal Arbitration Act?

LIST OF PARTIES AND CORPORATE AFFILIATES

The caption of the petition for writ of certiorari names "SBC Capital Markets, Inc. a/k/a SBC Warburg, Inc." as the Respondent. The proper name of the Respondent is Warburg Dillon Read LLC.

The Respondent has three equity owners: UBS AG (52.75%), UBS (USA) Inc. (47%), and UBS Inc. (0.25%). UBS (USA) Inc. is a Delaware corporation owned by UBS AG (95%) and UBS Inc. (5%). UBS Inc. is a New York corporation wholly owned by UBS AG.

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OPINIONS BELOW

The District Court's March 18, 1998 order, which denied the Respondent's motion to compel arbitration, was a minute order. Appendix B to the petition reprints only the reverse side of the minute order. The face of the minute order states:

> Defendant's motion to dismiss (4-2) and its motion to compel arbitration (4-1) are denied. Under recent authority, the discovery sought by plaintiff is appropriate before a decision can be reached on the issue of arbitration. Status hearing set for 4/17/98 at 9:45 a.m.

R. 31.[1]

STATEMENT OF THE CASE

The Petitioner's Title VII claims are facially subject to arbitration because she signed an agreement to arbitrate all employment claims, identical to the agreement held enforceable in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).[2] In that agreement, the Petitioner agreed to arbitrate all claims between herself and her employer, including employment-related claims, at the instance of either party. Now she urges three reasons why she should be relieved of her agreement:

> (1) The possibility that in arbitration a claimant might incur certain fees that have no exact

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1. Citations to the Pleading Volume of the Record on Appeal are in the form "R. __." The Exhibits Volume of the Record on Appeal actually contains a single plaintiff's brief (R. 11), with attached exhibits. Citations to the Appendix to the Petition are in the form "A. __."

2. In addition to claims under Title VII, the Petitioner also asserted below claims under the Equal Pay Act and the New York Human Rights Law. The Seventh Circuit held that all of these claims are subject to arbitration under the Petitioner's arbitration agreement. A. 2a, 18a. The Petitioner challenges that ruling only as it relates to her Title VII claims, conceding that her other claims are arbitrable.

counterpart in litigation assertedly may chill unemployed and impoverished claimants from asserting Title VII claims.

(2) Though no arbitration has occurred, the Petitioner fears that arbitrators may misapply the law.

(3) The 1991 Civil Rights Act, enacted six months after *Gilmer* and providing that arbitration of Title VII and other civil rights claims is "encouraged . . . where appropriate and to the extent authorized by law," purportedly codifies a pre-*Gilmer* hostility to arbitration.

The issues urged by the Petitioner are not only fraught with problems of standing and prematurity, but are otherwise unworthy of review. The Federal Arbitration Act ("FAA") mandates enforcement of agreements to arbitrate statutory disputes unless: (1) there are contract formation defects under state law; or (2) Congress plainly overrode the FAA in the statute at issue. The purported "forum fees" and "might not follow the law" issues asserted here are not contract formation defects, nor is there any credible reason to believe Congress intended to exempt Title VII from the FAA on these (or any other) bases. Nor, contrary to the Petitioner's assertions, is there a circuit split on whether agreements to arbitrate Title VII claims are unenforceable on these bases.

A. The Petitioner's Arbitration Agreement.

The Petitioner held a variety of employment positions with the Respondent, the last of which was as a securities trader. To protect customers, the SEC requires securities traders to register with the exchanges on which they trade.[3] In February 1995 the Petitioner therefore registered with five exchanges: the New

3. 17 C.F.R. § 240.1567-1; *see* SEC Release No. 34-32261, 58 Fed. Reg. 27656.

York Stock Exchange ("NYSE"), the National Association of Securities Dealers ("NASD"), the Chicago Board Options Exchange ("CBOE"), the Philadelphia Stock Exchange ("PHLX"), and the Pacific Stock Exchange ("PSE"). R. 5, Ex. A.

There is a standard form for registering with any exchange, called "Form U-4: Uniform Application for Securities Industry Registration or Transfer." Form U-4 (the same agreement that the Court construed in *Gilmer*, 500 U.S. at 23) is a contract between the registering trader and each designated exchange. *Id.* at 25 n.2. The Form U-4 contract includes, under the heading "THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY," an agreement by the applicant to follow any arbitration rules adopted by the designated exchanges for resolving disputes between the applicant and his or her employer. R. 5, Ex. A at 4. Not every exchange has such rules,[4] but at the time the dispute in this case arose, all five of the exchanges with which the Petitioner registered had rules requiring arbitration of disputes between the registrant and his or her employer, if either party requested it.[5]

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4. As the Seventh Circuit noted below, A. 16a n.2, the American Stock Exchange does not. *See* American Stock Exchange Rule 600(a) (American Stock Exchange Guide (CCH) ¶ 9540, at 2811 (1996)) (AMEX rules require arbitration of some disputes, but not disputes between associated members (i.e., traders) and their firms).

5. *See* NYSE Rule 347 (NYSE Guide (CCH) ¶ 2347 (1995)); NASD Rule 10101, 10201 (NASD Manual (CCH) at 7511 (1996)); CBOE Rule 18.1 (CBOE Constitution & Rules (CCH) ¶ 2511) (1995)); PHLX Bylaws § 10-8 (Philadelphia Stock Exchange Guide (CCH) ¶ 1232 (1996)); PSE Rule 12 (Pacific Stock Exchange Guide (CCH) ¶ 6435 (1993)).

The NASD and NYSE have now changed their rules to remove the requirement that statutory claims of employment discrimination must be arbitrated at the request of either party, though other employment claims remain subject to arbitration, and the exchanges

(Cont'd)

The Petitioner has admitted that she executed her Form U-4 agreement (R. 3, ¶ 22), though, like the plaintiff in *Gilmer*, she complains that it was "a condition of her employment." *Id.* But she does not dispute that the Court held Gilmer's Form U-4 agreement enforceable even though it was "required by his employment." 500 U.S. at 23. The Petitioner also contends that the "language of the arbitration agreement was non-negotiable." Petition at 4. But she does not dispute the Seventh Circuit's observation that arbitration occurs under the agreement's terms only if the employer or the employee requests it,[6] and whether

(Cont'd)

still provide an arbitration forum for those who wish to arbitrate statutory discrimination claims. The NASD Rules (Rule 10201) were amended effective January 1, 1999. *See* SEC Rel. No. 34-40109, 63 Fed. Reg. 35299, 1998 WL 339422. The NASD rule change is not retroactive. *See* NASD Regulation answers to frequently asked questions, <http://www.nasdr.com/2805.html>. The NYSE proposed rule change (SEC Rel. No. 34-40479, 63 Fed. Reg. 52782, 1998 WL 670164) was approved by the SEC on December 29, 1998 (SEC Rel. No. 34-40858, 64 Fed. Reg. 1051, 1999 WL 3315), and is silent on retroactivity. *See Koveleskie*, A. 3a n.1. On October 1, 1998, the SEC granted accelerated approval of the PHLX's proposal to discontinue its independent arbitration program. PHLX now refers member firms and registrants to the NASD arbitration forum. SEC Rel. No. 34-40517, 1998 WL 681447. On February 22, 1999, the CBOE amended its rules, effective that date, to provide that claims involving discrimination, including sexual harassment, are "not appropriate for arbitration at the Exchange." SEC Rel. No. 34-41080, 1999 WL 89027. On February 3, 1999, the PSE proposed an amendment to its arbitration rules to mirror the NASD's and NYSE's rule changes for arbitration of statutory employment claims. The SEC approved the PSE's proposed rule change on April 30, 1999. SEC Rel. No. 34-41350, 1999 WL 261839.

6. Contrary to the Petitioner's assertion that the Form U-4 requires arbitration "at the employer's option," Petition at 4, *either* side may request arbitration, and sometimes it is the employee who does so. *See, e.g., Glennon v. Dean Witter Reynolds*, 83 F.3d 132, 134 (6th Cir. 1996) (employee demanded arbitration of employment-related dispute; court affirmed arbitration award for employee, including $750,000 in punitive damages).

the parties choose to request it is fully negotiable. A. 16a & n.4. Indeed, the Petitioner's counsel have negotiated agreements with two large brokerage firms (Merrill Lynch and Smith Barney) not to request arbitration of employment discrimination claims, and have publicized those negotiated agreements by posting web sites. *See* <http://www.classactionmerrill.com>; <http://www.classactionsb.com>.

B. The Petitioner's Complaint and Proceedings Below.

The Petitioner was employed by Respondent until April 1996, when she walked off the job, claiming "constructive discharge" because of alleged denial of equal pay and opportunities and alleged inappropriate comments. R. 3, ¶¶ 4-15.[7] She filed an EEOC charge, file-stamped by the EEOC on July 2, 1996, R. 1, Ex. A, but before the EEOC made a determination she requested a right-to-sue letter. She filed her initial complaint on March 31, 1997. R. 1. The Respondent promptly moved to compel arbitration in accordance with the Petitioner's Form U-4 arbitration agreement and the exchanges' rules. R. 4, 5. In response, the Petitioner filed an amended complaint, R. 3, challenging the enforceability of her arbitration agreement on numerous grounds, most of which are not raised in this Court. The Respondent renewed its motion to compel arbitration, R. 7, 8, and the motion was fully briefed by May 29, 1997. R. 13.

The District Court held two brief status hearings in August 1997 (8-7-97 Tr.; 8-12-97 Tr.), but did not entertain argument on the motion. On March 18, 1998 the District Court denied the motion to compel arbitration in a brief minute order. R. 31.

The Respondent appealed the denial, and on February 4, 1999 the Seventh Circuit reversed, rejecting each of the

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7. Many of the alleged incidents are alleged to have occurred as early as 1986, far outside the 300 day period preceding the filing of the Petitioner's EEOC charge. Such claims are untimely. *See Skouby v. Prudential Ins.*, 130 F.3d 794, 796, 797 (7th Cir. 1997).

Petitioner's arguments why she should be excused from her agreement to arbitrate. A. 1a.

C. The Record.

The Petitioner asserts that she sought to take discovery and that the record contains "undisputed record evidence." Petition at 5. In fact, the Petitioner never propounded any discovery at all, and the District Court held no hearings so as to create any evidentiary record.

In her response to the Respondent's renewed motion to compel arbitration, R. 11, the Petitioner attached a variety of documents, which she now calls the "undisputed record evidence." Those attachments are not, of course, necessary or dispositive of such matters as the rules of the exchanges, which are published and readily available.

The Petitioner also refers to another attachment, a collection of 33 photocopies of NYSE arbitration awards, R. 11 at Ex. J, from which she invites conclusions about the imposition of fees in arbitration. The same collection of 33 awards (selected and assembled by undisclosed means) has been presented to other courts, including the First Circuit, which observed that "it does not appear to be the usual situation that a plaintiff is asked to bear forum fees. . . . [I]n the thirty-three arbitration cases . . . only one plaintiff who prevailed on statutory grounds was denied fees and costs." *Rosenberg v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 170 F.3d 1, 15-16 (1st Cir. 1999). Nor are securities industry arbitrations limited to these 33 cases. NASD and NYSE arbitration decisions are published by Westlaw in the FSEC-ARB database, and those published results reinforce the First Circuit's conclusion.

The Petitioner also refers to R. 11, Ex. I, a photocopy of an Arbitrator's Manual (misidentified as dated 1996; Ex. I is actually dated 1992), "compiled by members of the Securities Industry Conference on Arbitration (SICA) as a guide for

arbitrators" (R. 11, Ex. I, Preface), as "undisputed evidence." Petition at 6. She emphasizes a single sentence in the 50-page manual, stating that arbitrators "are not strictly bound by case precedent or statutory law," but omits all context. In fact, the manual stresses on the one hand the informality of arbitration, including the familiar principle that "strict rules of evidence" need not be applied and that "generally arbitration proceedings should be more informal and should permit more liberal introduction of evidence than would be permitted in courts" (Ex. I at 22-23), and on the other hand the arbitrator's duty to follow applicable statutes on matters of liability or attorney's fees (seeking guidance from the parties through briefs and oral argument) (*id.* at 24, 28), strengthened by an admonition that an award may be vacated if the arbitrator disregards the law (*id.* at 26).

The record does contain some undisputed facts: the admissions contained in the amended complaint. Among those admissions is the Petitioner's acknowledgment that, so far from being "a worker who has lost her job and is without gainful employment" who allegedly may be chilled from asserting Title VII claims (Petition at 11; *see also id.* at 8), the Petitioner was promptly reemployed in a securities position following her resignation from the Respondent. R. 3, ¶ 71.

REASONS FOR DENYING THE WRIT

The FAA provides that arbitration agreements are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The Court has recognized that the FAA embodies a "liberal federal policy favoring arbitration agreements" and "establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp. v. Mercury Const.*, 460 U.S. 1, 24-25 (1983). This is true even when the claims to be arbitrated involve important statutory rights. *Gilmer*, 500 U.S. at 26. As the Court has repeatedly emphasized,

> By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985). *See also Gilmer*, 500 U.S. at 26; *Rodriguez de Quijas v. Shearson/American Exp., Inc.*, 490 U.S. 477, 481 (1989); *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 229-30 (1987).

The Court has made clear that a party may challenge the enforceability of an arbitration agreement only on limited grounds. The first is suggested by the terms of the FAA itself: contract formation defects ("such grounds as exist at law or in equity for the revocation of any contract") may prevent the formation of a valid arbitration agreement. *See Gilmer*, 500 U.S. at 33 ("the FAA's purpose was to place arbitration agreements on the same footing as other contracts," subject to contract-formation defenses such as fraud). Such challenges must be evaluated under state contract-formation law (*see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1993)), and the state law cannot single out arbitration agreements, but must be applicable to "any contract," or it is preempted by the FAA (*see Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 686-88 (1996); *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 281 (1995); *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987)).

The Petitioner's complaints about arbitration — that she might incur forum fees or that the arbitrators might misapply the law — are not complaints about contract formation under state law.[8]

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8. The Petitioner does offer comments that she lacked knowledge about the workings of securities industry arbitration when she signed her Form U-4, that she "had no choice," and that the agreement was "non-negotiable." Petition at 4. She does not expressly urge these as grounds to invalidate her contract, and they are not grounds to invalidate

(Cont'd)

The second ground on which a party may challenge the enforceability of an agreement to arbitrate statutory claims is by showing that Congress intended to exempt the statute at issue from the FAA. As the Court explained in *McMahon*:

> The Arbitration Act, standing alone, . . . mandates enforcement of agreements to arbitrate statutory claims. Like any statutory directive, the Arbitration Act's mandate may be overridden by a contrary congressional command. The burden is on the party opposing arbitration, however, to show that Congress intended to preclude a waiver of judicial remedies for the statutory rights at issue. . . . If Congress did intend to limit or prohibit waiver of a judicial forum for a particular claim, such an intent "will be deducible from [the statute's] text or legislative history," . . . or from an inherent conflict between arbitration and the statute's underlying purposes.

McMahon, 482 U.S. at 226-27, *quoting Mitsubishi*, 473 U.S. at 628. *See also Gilmer*, 500 U.S. at 26-32 (finding no inconsistency between ADEA and FAA to indicate that Congress intended to exempt ADEA from FAA).

The prime questions posed by the Petition are whether the identified issues — the risks that arbitrators will impose forum

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(Cont'd)

a contract under Illinois law. *See, e.g., Bunge Corp. v. Williams*, 45 Ill. App. 3d 359, 364-65, 359 N.E.2d 844, 847-48 (5th Dist. 1977) (upholding arbitration agreement despite plaintiff's claim he did not appreciate what he signed); *Kewanee Prod. Credit Ass'n v. G. Larsons & Sons Farms*, 146 Ill. App. 3d 301, 305, 496 N.E.2d 531, 534 (3d Dist. 1986) (cited by Seventh Circuit, A. 12a-13a, for the proposition that "Illinois law does not void contracts when the parties have unequal bargaining power, even if the proposed contract is a so-called 'take-it-or-leave-it' deal and 'consent to [the] agreement is secured because of hard bargaining positions or the pressure of financial circumstances' ").

fees or misapply the law — demonstrate congressional intent to exempt Title VII from the FAA. These questions do not merit review. Nor does the final question — whether the 1991 Civil Rights Act's provision that arbitration is "encouraged . . . where appropriate and to the extent authorized by law" actually shows a congressional intent to bar arbitration — merit review.

I.

THE "FORUM FEES" ISSUE DOES NOT MERIT REVIEW.

The Petitioner asserts that a claimant in securities arbitration may incur expenses — filing and forum fees — that have no direct counterpart in federal court litigation, and that the risk such fees will be imposed may chill unemployed claimants of straitened means from asserting Title VII claims. Review of this claim should be denied because: (1) the Petitioner lacks standing to assert it; (2) the issue is not an unsettled one of great importance; and (3) the asserted circuit split does not exist.

A. The Petitioner Lacks Standing.

The Petitioner asserts that "the possibility that expensive fees may be assessed against a worker who has lost her job and is without gainful employment will chill her willingness to arbitrate her discrimination claims." Petition at 11. Even if this "possibility" were real,[9] the Petitioner lacks standing to

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9. In fact, fees may be waived in case of hardship and arbitrators retain discretion how to allocate fees between the parties. *See* SEC Rel. 34-41056, 64 Fed. Reg. 10041, 10048 & n.95 (March 1, 1999):

> NASD Regulation has stated it will waive the initial filing fee and hearing session deposit at the time of filing if a party can demonstrate financial hardship. Arbitrators also may order a respondent to reimburse a claimant for the amount of the filing fee paid at the beginning of the case.

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challenge the chill experienced by the unemployed, for she is employed. R. 3, ¶ 71.

A party "has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 166 (1972). When a plaintiff herself is "not chilled, but seek[s] only to represent those 'millions' who[m] [she] believe[s] are so chilled, [she] clearly lack[s] that 'personal stake in the outcome of the controversy essential to standing.' " *Tatum v. Laird*, 408 U.S. 1, 14 n.7 (1972), *quoting Baker v. Carr*, 369 U.S. 186, 204 (1962).

B. There is No Unsettled Issue of Great Importance.

Apart from the question of chill, the Petitioner suggests that it would violate the substantive statute (Title VII) to enforce an agreement to arbitrate, when the arbitral forum may involve expenses without counterpart in litigation. The Court rejected precisely such an argument in *Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995). The petitioner there had entered an agreement to arbitrate disputes about a shipment of goods from Morocco to Boston before a panel of Japanese arbitrators in Tokyo, but sought instead to litigate a dispute in federal court in Boston. The petitioner argued that the "inconvenience and costs of proceeding in Japan" would undermine the substantive protections of the governing statute (the Carriage of Goods by Sea Act ("COGSA")), and that

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See, e.g., In re Arbitration between Owen-Williams and Merrill Lynch, 1997 WL 34966 (NASD, Nov. 12, 1997), at *2 (waiving fees because of hardship). *See also* SEC Rel. No. 34-41056, 64 Fed. Reg. at 10048, 10050 ("fees are not automatically imposed on either party . . . . [A]rbitrators make fee allocations after a hearing on the record"); *id.* at 10050 ("it is the arbitrators who decide who will pay [fees] in any individual case"); NASD Rules 10205, 10332; NYSE Rule 629. Published arbitration decisions suggest that employers usually bear all or a substantial portion of forum fees even when they prevail.

COGSA therefore took priority over the FAA. *Id.* at 532. The Court rejected this argument, holding that there is a difference "between explicit statutory guarantees and the procedure for enforcing them, between applicable liability principles and the forum in which they are to be vindicated," and any "inconvenience and costs" associated with the arbitral forum were no reason to invalidate the agreement to arbitrate. *Id.* at 534.

The Court reached a similar conclusion in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991). *Shute* held a pre-printed form agreement with a forum-selection clause enforceable, despite the inconvenience and expense of the forum (Florida) to the plaintiff (a resident of Washington State). The Court rejected the plaintiff's argument that "unreasonable hardship in asserting [substantive statutory] rights" would undermine the substantive protections of the governing statute (the Limitation of Vessel Owners' Liability Act). *Id.* at 596.

The issue asserted here — whether the transaction cost of resolving a statutory claim in an alternative forum compromises substantive statutory rights, so as to support an inference that the alternative forum is irreconcilable with the statute — is not an unsettled issue of great importance, for the Court has already resolved it in *Vimar Seguros* and *Shute*.

Indeed, the Petitioner's assumption that arbitration is more expensive than litigation is hardly established. Though arbitral forum fees (if they are imposed on a claimant at all) may have no precise litigation counterpart, they are only one component of the possible expenses of arbitration versus litigation.[10] The Court has recognized that arbitration and litigation procedures are not identical, and that there are trade-offs of advantages

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10. *See* SEC Rel. No. 34-41056, 64 Fed. Reg. at 10050 n.107 ("Litigation is likely to involve other significant costs associated with depositions and attorney fees that would likely be lower in an arbitration setting.").

between the two. *Gilmer*, 500 U.S. at 31. The aim of arbitration is to seek "streamlined proceedings and expeditious results" in order "to keep the effort and expense required to resolve a dispute within manageable bounds." *Mitsubishi*, 473 U.S. at 633. Arbitration "is usually cheaper and faster than litigation." *Allied-Bruce Terminix*, 573 U.S. at 280. *See also Rosenberg*, 170 F.3d at 16 ("arbitration is often far more affordable to plaintiffs and defendants alike than is pursuing a claim in court").[11]

Apart from the speed of proceedings, litigation may involve expenses not found in arbitration. In court, a losing plaintiff's liability for the other side's costs under Fed. R. Civ. P. 54(d) (including, e.g., filing fees, deposition transcript costs, witness fees, copying charges; *see* 28 U.S.C. § 1920) is virtually automatic, and may be substantial.[12] The published NYSE and

11. Even if the forum fees are viewed in isolation, the Petitioner's asserted contrast between a litigation forum subsidized by taxpayers and an unsubsidized arbitral forum is a false one. The entire cost of securities industry arbitration is not imposed on the litigants. *See* SEC Rel. 34-41056, 64 Fed. Reg. at 10047 ("[T]he filing fees and hearing session deposits . . . do not cover the cost of administering the [NASD arbitration] program"); *id.* at 10047 n.89 ("filing and hearing session fees" pay for approximately 50-68% of the direct costs for administering individual cases); *id.* at 10047 n.89, 10048 n.97 (filing fee and hearing session fees do not cover "NASD Regulation's general costs for administering the arbitration department, including costs for arbitrator recruitment and training, computer systems, office space, senior management, and legal services;" member surcharges pay for NASD Regulation's general costs for arbitration administration and for the shortfall (estimated to be $6.1 million per year) between fees assessed in individual cases and the direct costs for administering those cases). *See also id.* at 10048 ("the arbitration program is subsidized by the NASD and its members"); NASD Notice to Members 99-23 (March 18, 1999) ("Since its adoption of the Code in 1968, the NASD has subsidized a substantial portion of the cost of the arbitration program from general member assessment revenue.").

12. *See, e.g., Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (Cont'd)

NASD arbitration decisions show that in arbitration, unlike in litigation, losing claimants are rarely assessed costs (suggesting that arbitrators' freedom from strict adherence to the rules of litigation benefits plaintiffs).

Even if there were reason to believe arbitration is more expensive overall than litigation (which appears doubtful), it would be no reason to hold that Congress intended to preclude agreements to arbitrate Title VII claims, as *Vimar Seguros* makes clear. Because this issue is not an important unsettled one, the Court should deny review.

C. No Circuit Split Exists.

The Petitioner asserts that a circuit split exists on the question whether a risk of incurring forum fees renders an

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(1981) (even for a civil rights plaintiff, "liability for costs is a normal incident of defeat"); *Contreras v. City of Chicago*, 119 F.3d 1286, 1295 (7th Cir. 1997) (civil rights plaintiff who loses is liable for costs unless narrow exception such as indigence applies; chilling effect on civil rights claims is not a reason to deny costs); *Cypress-Fairbanks Indep. School Dist. v. Michael F.*, 118 F.3d 245, 256-57 (5th Cir. 1997) (chilling effect is no reason to deny a prevailing defendant Rule 54(d) costs; costs of $6,770 imposed on losing disabilities/civil rights plaintiff); *Jones v. Continental Corp.*, 789 F.2d 1225, 1233 (6th Cir. 1986) (rejecting argument that "taxing costs against a losing civil rights plaintiff would conflict with the remedial purposes of Title VII"); *Poe v. John Deere Co.*, 695 F.2d 1103, 1108 (8th Cir. 1982) (same); *Delta Air Lines, Inc. v. Colbert*, 692 F.2d 489, 490-91 (7th Cir. 1982) (same); *Barnett v. City of Chicago*, 1999 WL 138813, at *7-8, 10 (N.D. Ill. March 5, 1999) ($11,674.89 in costs imposed on losing plaintiffs, despite claims of hardship and chilling effect on assertion of important civil rights claims); *Pion v. Liberty Dairy Co.*, 922 F. Supp. 48, 50-51 (W.D. Mich. 1996) (same; costs of more than $8,000 awarded against losing plaintiff); *Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 157 F.R.D. 13, 18 (E.D. Pa. 1994) (same; more than $12,000 in costs imposed on losing plaintiff).

arbitration agreement unenforceable. The supposed split of authority does not exist.

Shankle v. B.G. Maintenance Management, 163 F.3d 1230, 1234-35 (10th Cir. 1999), held an arbitration agreement invalid, but only because it mandated in advance that the employee must pay forum fees regardless of outcome (a result that may be an improper prospective waiver of a prevailing Title VII plaintiff's right to recover costs, 42 U.S.C. § 2000e-5(k)). *Shankle* expressly stated that other arbitral schemes are not invalid, citing *Gilmer* and the securities arbitration scheme at issue here. 163 F.3d at 1234 & n.3. In contrast to *Shankle*, under securities arbitration the arbitrator remains free to waive or allocate costs as appropriate, as the Seventh Circuit held below. A. 10a.

Paladino v. Avnet Computer Techs., 134 F.3d 1054 (11th Cir. 1998), also denied arbitration, but on the ground that the arbitration agreement forbade arbitrators from awarding Title VII or ADEA remedies, making the agreement either not extend to Title VII or ADEA claims (*id.* at 1058), or contain an unlawful limitation of remedies (*id.* at 1060-62). Although the concurrence expressed additional concern about the cost of arbitration to plaintiffs, the court's holding was based on the limitation of remedies.

No other case cited by the Petitioner denied arbitration because of potential forum fees. The Petitioner assumes that the Ninth Circuit *would* do so, Petition at 10, simply because it denied arbitration of certain claims on different grounds. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir. 1998). Since the Ninth Circuit did not address the forum fees issue at all (and actually compelled the plaintiff to arbitrate certain other claims, *id.* at 1200, 1203) it cannot fairly be said to have "split" with any court. Nor can the Third Circuit be said to have "split" the other way, simply because it allowed arbitration in *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998), for *Seus* likewise did not address this issue.

Nor did the D.C. Circuit deny arbitration on this ground. Instead, in *Cole v. Burns Int'l Security Servs.*, 105 F.3d 1465, 1483-86 (D.C. Cir. 1997), the court construed an AAA arbitration agreement as not allowing employees to bear forum fees, and *compelled* arbitration.

Contrary to the Petitioner's assertion, neither of the remaining circuits she identifies (the Seventh Circuit (below) and the First Circuit (*Rosenberg*)) held that securities arbitration "requires employees to pay expensive forum or filing fees."[13] Petition at 9. Instead, they recognized that securities arbitrators have discretion to waive or shift fees, and that it is premature to complain of burdensome fees when none have been imposed. A. 10a; *Rosenberg*, 170 F.3d at 15.

The asserted circuit split is illusory and no reason to grant review.

II.

THE "MIGHT NOT FOLLOW THE LAW" ISSUE DOES NOT MERIT REVIEW.

The Petitioner fears that arbitrators will misapply the law. Petition at 14-16. She bases this fear on a single phrase from the 50-page Arbitrator's Manual, taken out of context. Courts have repeatedly recognized that the manual does not counsel arbitrators to ignore the law.[14] In any event, no arbitrator has

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13. The Petitioner cites no case to support her contention that an arbitral filing fee being higher than a court filing fee invalidates an arbitration agreement, much less a circuit split on the issue. In fact, the D.C. Circuit found no problem with an arbitral filing fee. *Cole*, 105 F.3d at 152 n.12. *See also Howard v. Anderson*, 36 F. Supp. 2d 183, 186 (S.D.N.Y. 1999) ($500 arbitral filing fee is not inconsistent with Title VII).

14. *See, e.g., Illyes v. John Nuveen & Co.*, 949 F. Supp. 580, 584 (N.D. Ill. 1996):

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applied any law in this case, because no arbitration has occurred. Review of this issue is unwarranted because: (1) the objection is premature; and (2) there is no circuit split.

A. The Objection is Premature.

The Court has repeatedly stated that "there is no reason to assume at the outset that arbitrators will not follow the law."[15] Instead, the review stage after arbitration has occurred is the proper time to consider this issue: "[A]lthough judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute."[16]

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> [T]he NASD arbitration manual does not instruct arbitrators that they do not have to follow the law; it merely states that they are not "strictly bound by case precedent or statutory law." The arbitrators are also told that if they manifestly disregard the law, the award may be vacated.

See also Seus v. John Nuveen & Co., 1997 WL 325792, at *7 (E.D. Pa. June 2, 1997) ("In fact, the arbitrator's training guide does not tell arbitrators that they do not have to follow the law"), *aff'd*, 146 F.3d 175 (3d Cir. 1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1028 (1999); *Rosenberg*, 170 F.3d at 16 n.10; *Koveleskie*, A. 9a; *Duffield v. Robertson Stephens & Co.*, 1996 U.S. Dist. LEXIS 21571, at *17-18 (N.D. Cal. Aug. 26, 1996) (rejecting claim based on instructions in the Arbitrator's Manual, court holds that "NYSE arbitration scheme does adequately protect plaintiff's Title VII rights"), *aff'd in part, rev'd in part on other grounds*, 144 F.3d 1182, 1190 n.7 (9th Cir.), *cert. denied*, __ U.S. __, 119 S. Ct. 445 (1998).

15. *McMahon*, 482 U.S. at 232 (1987). *See also Mitsubishi*, 473 U.S. at 634 ("We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators"); *id.* at 636.

16. *McMahon*, 482 U.S. at 232. *See also Gilmer*, 500 U.S. at 32 n.4; *Mitsubishi*, 473 U.S. at 636-37 & n.19.

The Court recently considered this issue again in *Vimar Seguros*, where the arbitration agreement specified a Japanese arbitral forum. The plaintiff acutely feared that the arbitrators would fail to apply the applicable U.S. statutory law and therefore argued that his arbitration agreement was invalid. The Court held this claim "premature," reaffirming that the time to consider the arbitrators' compliance with the law was on review because the court "will have the opportunity at the award-enforcement stage to ensure that the legitimate interest in the enforcement of the . . . laws has been addressed." *Vimar Seguros*, 515 U.S. at 540, *quoting Mitsubishi*, 473 U.S. at 638.

The Petitioner contests the Court's repeated conclusion that review will be sufficient, arguing that the standard of review is too strict. For example, the Petitioner argues that a prevailing plaintiff may be entitled to attorneys' fees as a matter of law, yet not be awarded them by an arbitrator. Petition at 14-16. Review is sufficient, however, not only when arbitrators are expressly urged to disregard the law, *Montes v. Shearson Lehman Brothers, Inc.*, 128 F.3d 1456, 1464 (11th Cir. 1997), but also when they are advised of the law and do not follow it. The cases demonstrate that if a plaintiff has an entitlement (for example, to attorneys' fees) and specifically advises the arbitrator of the law, an erroneous denial of fees may be reversed, even under a strict standard of review. *Contrast DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 822 (2d Cir. 1997), *cert. denied*, __ U.S. __, 118 S. Ct. 695 (1998) (arbitrator did not manifestly disregard the law because plaintiff did not tell arbitrator of basis for entitlement to fees), *with DeGaetano v. Smith Barney Inc.*, 983 F. Supp. 459, 462-64 (S.D.N.Y. 1997) (when plaintiff did advise arbitrator of law creating entitlement to fees, the arbitrator's failure to award fees was reversible under the manifest disregard standard).[17]

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17. A party will have every opportunity to advise the arbitrators of the law. Arbitrators are free and even encouraged to accept briefs. *See Valdiviezo v. Phelps Dodge*, 995 F. Supp. 1060, 1070-71 (D. Ariz. 1997).

Because the Petitioner's objection is premature, this issue does not merit review.

B. There is no Circuit Split.

The Petitioner admits that there is no circuit split on the "may not follow the law" issue, but she urges review because "it is likely" there will be one in the future, based on an asserted "shared reasoning" among decisions that have denied arbitration on other grounds. Petition at 15. It is not appropriate to grant review of an issue based on a party's prediction of future circuit conflicts that do not and may never exist.

Indeed, the Petitioner's predictions that four courts "would reject" the reasoning of the Seventh Circuit (Petition at 15) cannot withstand scrutiny. For example, she asserts that the Ninth Circuit would "[n]aturally" reject securities arbitration on the "may not follow the law" theory, but overlooks the fact that the Ninth Circuit compelled arbitration of a plaintiff's non-statutory claims (*Duffield*, 144 F.3d at 1200, 1203), and has compelled arbitration of Title VII claims in the past (*Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992)). Similarly, *Shankle* and *Paladino* did not void arbitration agreements because of supposed inadequate procedures, but rather because of a " 'prospective waiver of a party's right to pursue statutory remedies,' " which the Court has condemned as against public policy. *Vimar Seguros*, 515 U.S. at 540, *quoting Mitsubishi*, 473 U.S. at 637 n.19.

And while the Fourth Circuit in *Hooters of America, Inc. v. Phillips* did reject an arbitral forum because of its procedural inadequacies, the court stated that its decision was based on generally-applicable contract principles (the employer's breach of its promise to draft fair procedures), not on Title VII. 1999 WL 194438 (4th Cir. April 8, 1999), at *7. Otherwise, it acknowledged, "[p]redispute agreements to arbitrate Title VII claims are . . . valid and enforceable." *Id.* at *3-4. The court specifically cautioned that its decision should not "be

misunderstood as permitting" the kind of "full-scale assault on the fairness of proceedings before a matter is submitted to arbitration" (*id.* at *7) that the Petitioner has advocated.

This Court has stated that "insular distrust of the ability of . . . arbitrators to apply the law" is not a basis for relieving a party of its agreement to arbitrate. *Vimar Seguros*, 515 U.S. at 539. There is no reason to presume that the Petitioner and Respondent will be "unable or unwilling to retain competent, conscientious, and impartial arbitrators" to resolve their dispute. *Mitsubishi*, 473 U.S. at 676. Rather, the Court of Appeals below correctly applied controlling precedent when it concluded that, in the unlikely event of an error, "judicial review of arbitration awards is sufficient to protect statutory rights." A. 11a.

III.

THE EFFECT OF THE 1991 CIVIL RIGHTS ACT ON ARBITRATION AGREEMENTS DOES NOT WARRANT REVIEW.

As discussed above, the FAA makes arbitration agreements presumptively enforceable, unless: (1) no valid agreement exists under state contract law (an issue not raised here); or (2) Congress overrode the FAA in another statute. Having argued in Sections I.A and I.B of the Petition that her arbitration agreement is unenforceable on "forum fees" and "might not follow the law" bases, without reference to the necessary legal standard (whether Congress intended to override the FAA on these bases), the Petitioner argues in the final section of her Petition that in the 1991 Civil Rights Act amendments to Title VII Congress did so intend. This argument cannot be independent of the earlier "forum fees" and "might not follow the law" arguments. Nor do the Petitioner's arguments, when directly addressed to the critical issue of Congress's intent, add any compelling reason to grant review: (1) the 1991 Act does not address the "forum fees" or "might not follow the law"

issues, but rather "encourages" arbitration; and (2) while there is a circuit split on whether the 1991 Act overrode the FAA for Title VII claims, the clear trend in the circuits is to enforce agreements to arbitrate Title VII claims.

A. The 1991 Civil Rights Act Does not Address the "Forum Fee" or "Might not Follow the Law" Issues.

Section 118 of the 1991 Act states:

> Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under [Title VII and other civil rights statutes].

A. 42a. This section, the Petitioner argues, evinces a congressional intent to override the FAA, carving out as unenforceable those arbitration agreements affected by the "forum fees" and "might not follow the law" issues. Petition at 17-19.

The Petitioner cites no statutory language to support her position. The text of Section 118 nowhere refers either to forum fees or to the possibility that arbitrators might not follow the law. Indeed, the text of Section 118, so far from placing limits on the enforceability of arbitration agreements, expressly "encourages" arbitration.

The Court has made clear that if a statute's text does not evidence a congressional intent to preclude arbitration, the party seeking to avoid arbitration must show "an irreconcilable conflict" between arbitration and the statute's underlying purposes. *McMahon*, 482 U.S. at 238-39. The Petitioner asserts that the purpose of the 1991 Act was to strengthen Title VII (Petition at 17),[18] but she does not explain why arbitration would

18. In particular, she mentions the addition of rights to damages and a jury trial, and enhanced rights to attorney's fees. Any substantive (Cont'd)

be inconsistent with that purpose, particularly when the statute "encourages" arbitration. " 'By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " *Rodriguez*, 490 U.S. at 481, *quoting Mitsubishi*, 473 U.S. at 628.

Instead of relying on the text, the Petitioner seeks refuge in pieces of legislative history, which she asserts "demonstrate Congress's belief" that her particular agreement is unenforceable. Petition at 18. But the text of Section 118 is not ambiguous, particularly when viewed, as it must be, "with a healthy regard for the federal policy favoring arbitration." *Gilmer*, 500 U.S. at 26. Absent such ambiguity, resort to legislative history is neither legitimate nor appropriate, for "legislative history is 'only admissible to resolve doubt and not to create it.' " *In re Sinclair*, 870 F.2d 1340, 1343 (7th Cir. 1989), *quoting Wisconsin R.R. Comm'n v. Chicago, B. & O. R.R.*, 257 U.S. 563, 589 (1922).

Even if it were appropriate to consider legislative history, however, nothing in the legislative history of the 1991 Act remotely addresses the issues of forum fees and the possibility that arbitrators might not follow the law. Rather, the legislative history reveals sharp debate about whether Title VII claims should be arbitrable at all. *Compare* H.R. Rep. No. 40(I)97, *reprinted in* 1991 U.S.C.C.A.N. 635; 137 Cong. Rec. H9505-01, *H9530 (Nov. 7, 1991) (Rep. Edwards) ("No approval is

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right to damages and attorney's fees can be resolved in an arbitral forum. *See Gilmer*, 500 U.S. at 32. Jury trial is a procedural, not a substantive, matter (*see Landgraf v. USI Film Prods.*, 511 U.S. 244, 280 (1994)), and parties are free to forgo that procedure by electing an arbitral forum. Indeed, the Court found no problem enforcing such an election in *Gilmer*, even though the substantive statute there at issue (ADEA) already featured a jury trial right (*see Lorillard v. Pons*, 434 U.S. 575, 580-85 (1978)). *See Rosenberg*, 170 F.3d at 11.

intended of the Supreme Court's recent decision in *Gilmer*") *with* 137 Cong. Rec. H9505-01, *H9548 (Nov. 7, 1991) (Rep. Hyde) (Section 118 "encourages the use of alternative means of dispute resolution, including binding arbitration . . . . [T]here is no reason to disfavor the use of such forums. *See Gilmer*"); *and* 137 Cong. Rec. S15472-01, *S15478 (Oct. 30, 1991) (Sen. Dole) (same).[19] But "[t]he text adopted by the full Congress declares that lawful 'arbitration . . . is encouraged to resolve disputes arising from [Title VII]." *Seus*, 146 F.3d at 182 (brackets in original).

As the Court observed in *Vimar Seguros*, " 'when [the FAA and another statute] are capable of co-existence, . . . it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective.' " 515 U.S. at 533, *quoting Morton v. Mancari*, 417 U.S. 535, 551 (1974). Here, there is not even a hint of congressional intention, from the text, purpose, or legislative history of Title VII, to make Title VII override the FAA when a claimant might incur forum expenses or an arbitrator might fail to follow the law — just as the Court found no congressional intention to override the FAA in precisely these circumstances in *Vimar Seguros*. Nor has the Petitioner cited any case to the contrary. Without an unsettled important issue or a conflict in the courts, there is no basis to grant review of this issue.

B. The Effect of the 1991 Civil Rights Act on *Gilmer* Does not Merit Review.

Rule 14.1(a) provides that "[t]he statement of any question presented is deemed to comprise every subsidiary question fairly

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19. *See* Stephen Breyer, On the Uses of Legislative History in Interpreting Statutes, 65 S. Cal. L. Rev. 845, 861-62 (1992) (observing that such use of legislative history is like "looking over a crowd and picking out your friends," and noting that where the legislative history of a statute is so confusing and contradictory that it is of no use in ascertaining Congress's intent, courts should not attempt to use it).

included therein." Although the Petitioner does not address it, whether the 1991 Act overruled *Gilmer* presents such a question.

In the wake of *Gilmer*, and before *Duffield*, every circuit court to consider the issue, including the Ninth Circuit, held that a predispute agreement to arbitrate Title VII claims was enforceable under the FAA.[20]

In *Duffield*, a separate panel of the Ninth Circuit (Reinhardt, Canby, and Restani, JJ.) held that the 1991 Act overruled *Gilmer*, without attempting to distinguish *Mago*.[21] Reasoning that the legislative history of Section 118 demonstrated an intent to codify pre-*Gilmer* law, which was hostile to arbitration, Judge Reinhardt held that predispute agreements to arbitrate Title VII claims, entered into as a condition of employment, are unenforceable. 144 F.3d at 1189-90. Although the Petitioner urged the Court of Appeals below to follow *Duffield* in this

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20. *See Cole*, 105 F.3d at 1468-69; *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 881-82 (4th Cir.), *cert. denied*, __ U.S. __, 117 S. Ct. 432 (1996); *Alford v. Dean Witter Reynolds, Inc.*, 939 F.2d 229, 229-30 (5th Cir. 1991) (opinion after Supreme Court granted certiorari, vacated decision refusing to compel arbitration of Title VII claim, and remanded for further consideration in light of *Gilmer*); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 307, 312 (6th Cir. 1991); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997); *Mago v. Shearson Lehman Hutton Inc.*, 956 F.2d 932, 935 (9th Cir. 1992) (Wallace, C.J., Goodwin and Kozinski, JJ.); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1486-87 (10th Cir. 1994); *Bender v. A.G. Edwards & Sons, Inc.*, 971 F.2d 698, 700 (11th Cir. 1992).

21. In fact, in an unpublished 1994 disposition the Ninth Circuit considered and rejected the very arguments that persuaded a separate panel of the court in *Duffield*. The court held that the plaintiff's "citation to the legislative history, by which she attempts to distinguish *Gilmer* and *Mago*, is unavailing." *Hurst v. Prudential Securities Inc.*, 21 F.3d 1113 (9th Cir. 1994) (table) (Lay, S.J., Thompson and Rymer, JJ.), 1994 WL 118097, at *6 n.2.

regard, she does not suggest that this Court should take review on this issue.

The Respondent agrees that review is unwarranted for two reasons. First, because the defendants in *Duffield* sought review in this Court without seeking rehearing en banc, the Ninth Circuit has yet to address the apparent intra-circuit conflict between *Duffield* and *Mago*. Second, every circuit court to consider the effect of Section 118 in light of *Duffield* has rejected the Ninth Circuit's reasoning. *See Rosenberg*, 170 F.3d at 10-12; *Seus*, 146 F.3d at 182-83 & n.1; *Koveleskie*, A. 5a-9a. This Court denied review in *Duffield* and *Seus* earlier this Term. As the issue continues to percolate, the clear trend is in favor of enforcing predispute agreements to arbitrate Title VII claims. It would better conserve this Court's scarce resources to permit the Ninth Circuit the opportunity to reconsider *Duffield* in light of these developments.

CONCLUSION

The three issues presented here are not worthy of review because, in addition to problems of standing and prematurity, they present neither unsettled questions of great importance nor involve a split in the circuits. Indeed, the Petitioner's particular objections to securities industry arbitration pursuant to Form U-4 have no prospective vibrancy in light of recent changes to the exchanges' arbitration rules. The petition for writ of certiorari therefore should be denied. If any review is allowed, it should be limited to the issue whether the 1991 Civil Rights Act overruled *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), and exempted civil rights laws, including Title VII and ADEA, from the Federal Arbitration Act.

Respectfully submitted,

CATHERINE M. MASTERS
Counsel of Record
NEIL LLOYD
SCHIFF HARDIN & WAITE
Attorneys for Respondent
Warburg Dillon Read LLC
6600 Sears Tower
Chicago, Illinois 60606
(312) 258-5500

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